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Supreme Court of the United States

OCTOBER TERM, 1905.

No. [redacted] 129

THE COUNTY COMMISSIONERS OF WICOMICO COUNTY
Petitioners

VS.

SAMUEL BANCROFT, JR.,
Respondent.

BRIEF ON BEHALF OF THE PETITIONERS FOR WRIT OF CERTIORARI.

JAMES E. ELLEGOOD,
Attorney for Petitioners.

BREWINGTON BROS. CO., 103 Main Street, Salisbury, Md.

Supreme Court of the United States

OCTOBER TERM, 1905

No. 424

The County Commissioners for Wicomico County

vs.

Samuel Bancroft, Jr.

Brief on Behalf of the Petitioners for Writ of Certiorari.

Whether the proceedings in this case should be reviewed on direct appeal, or on writ of certiorari is not so important, as whether the Petition and Record from the Circuit Court of Appeals present questions requiring the consideration of this Honorable Court.

It is respectfully submitted that they do.

FIRST. Because of the gravity of the issues involved in restraining an arm of the state government in the matter of taxation;

SECOND. Because of the alleged impairment of the obligation of a contract between the State of Maryland and one of its corporate bodies;

THIRD. Because of the direct conflict between the decisions of the U. S. Circuit Court for the District of Maryland, and the Court of Appeals of the State of Maryland upon the construction of its statutes;

FOURTH. Because, not only the Petitioner in this case, but the Commissioners of every other county through which the Baltimore, Chesapeake and Atlantic Railway runs, are entitled to know their rights, powers, duties, and responsibilities, which can only be conclusively determined by this Court of last resort in such cases where there is a conflict.

Samuel Bancroft, Jr., a bondholder of the Baltimore, Chesapeake and Atlantic Railway Company, filed his bill of complaint against the petitioners as a body corporate and as individuals, to restrain them "from in any manner assessing, levying or collecting taxes against the property, etc.,

mbraced in a mortgage dated September 1, 1894, of the Baltimore, Chesaeake and Atlantic Company to secure bonds held by the complainant, r attempting or threatening to do so." Rec. p. 12.

The question first arose on demurrer to the bill of complaint (Record age 15) and was decided adversely to the petitioner, (Respondent below) Record page 16); and then it was presented on Bill, Answer and "Agreed tatement of Facts" (Record pages 19-34) and decided adversely to the etitioners as to more than $60,000.00; and in its favor as to the residue Decree-Record page 123); by which decree it was on "the 6th day of pril, 1903, ordered, adjudged and decreed that the defendants (petitionrs herein) be, and they are hereby enjoined and prohibited from *levying, ssessing or collecting taxes* upon so much of the property of the Baltimore, hesapeake and Atlantic Railway Company, situated and being in Wicoico county, Maryland, as was formerly the property of the Baltimore nd Eastern Shore Railroad Company, constructed and built by the said ailroad under its charter to construct and build a line of railroad between ts termini at Eastern Bay in Talbot County and Salisbury, in Wicomico ounty, in this state, which said property was subsequently sold at foreosure sale of the Baltimore and Eastern Shore Railroad Company, and ecame, through this sale, the property of the Baltimore, Chesapeake and tlantic Railway Co." As to the other property mentioned in the bill of omplaint "the relief prayed for in this bill is hereby denied." This was ffirmed on cross appeals by the U. S. Circuit Court of Appeals for he Fourth Circuit. For the review of this decision the petition in this ase is filed.

There are four classes of property in the schedule, though it may be lassed as three:

1. That scheduled (a) page 32 of the Record, constructed by the altimore and Eastern Shore R. R. Co., through four counties, from Eastrn Bay, an arm of the Chesapeake Bay, to Salisbury, Wicomico County, Iaryland.

2 & 3. That bought (b) from the Wicomico and Pocomoke R. R. o., by the Baltimore and Eastern Shore R. R. Co., and certain rolling tock (c) belonging to both of these corporations.

4. That acquired by the Baltimore, Chesapeake and Atlantic Railay since its acquisition of the property in classes 1, 2 & 3. (Record pages 2-34)

The correctness of the Court's ruiling in taking jurisdiction and in joining the Petitioners is what this Honorable Court is asked to review.

Considered on the demurrer to the bill, or as made out by the "facts" agreed upon, we respectfully contend that the case is not such as entitles the Complainant to the relief prayed for or as decreed (Record pages 1-12 for the bill of complaint).

FIRST. *Is not the Bill Defective for want of proper parties, and because a decree would be ineffective?* It should have included the Tax Collector for the years 1900 and 1901, who under Art. 81 Sec. 31 Code of Public General Laws of Maryland may, "if he found it necessary, proceed by way of distress" and shall give notice, &c. Sec. 81, Sec. 49 et seq.; see also Ch. 76, Acts of 1902, local statute relating to the collecting of taxes in Wicomico County, amending Act 1894, Ch. 398. By these Statutes the Treasurer and Collector are the same and made elective.

The Baltimore, Chesapeake and Atlantic Railway Company was also a necessary party;

City of Dawson vs. Columbia Trust Co., 197 U. S. 180. This was a suit by the Trustee instead of a bond-holder. The Court said, "The bill should have been dismissed for want of jurisdiction. The water company is admitted to have been a necessary party and it, like the defendant city, was a Georgia corporation."

Against whom will the injunction be inforced? New Orleans Water Works 164 U. S. 481 held such a decree to be of no avail, although this Court had decided in favor of the complainants claim of right in the prior cases of New Orleans Water Co., vs. Rivers, 115 U. S. 674; St. Tamany Co. vs. New Orleans Water Co., 120 U. S. 64. A Court of Chancery must have all parties before it to make a decree effective. In Water Co's case above, the Court refused to give "a decree for its (city) guidance in the future", page 482.

To go against the body corporate would be ineffective and the individuals who did the assessing in November 1899 were out of office before the decree, if not before the filing of the bill of complaint, while the term of office of those who made the levies of 1900 and 1901 have expired. Then too the decree is wholly inoperative as against the Collector for 1900 and 1901, because not a party to the suit.

SECOND. *Has not the question become re-adjudicata by the Courts of Maryland?* and by this Court. See par. XIV of the bill of complaint, page 9 of Record. This decision of the Court of Appeals of Maryland is admitted and is reported in 89 Md. 89, Mayor, &c. vs. Baltimore, Chesapeake and Atlantic Railway Company. For record of this case see pp. 89-95 of Record.

This case was carried to the United States Supreme Court on writ of error by the Baltimore, Chesapeake & Atlantic Railway Co. and was presented on motion to dismiss and on the merits at the same time and was dismissed November 1900 on the authority of cases cited and can be found among the cases disposed of without opinion in 179 U. S. Reports.

Among the cases cited we refer especially to Lehigh Water Co. vs. Easton, 121 U. S. 388 and Central Land Co. vs Laidley, 159 U. S. 103, as containing the doctrine which fits the facts in this case. In the latter it was held that the obligation of the contract must have been impaired "by some act of the legislative power of the State and not by a judicial department only." These cases show that this Court had in mind the interpretation of the Statute and also whether a federal question was involved.

After this decision, the County Commissioners of Wicomico County, in obedience thereto, took up the matter of assessment of the property of this Railway Co., and gave the company due notice of their intention to assess it, and did assess it in Nov. 1899. (paragraph Tenth, Record pages 30 and 31. But the company "claimed that the same was exempt, and declined to pay the said taxes," whereupon the said County Commissioners brought suit, and recovered judgment for taxes for 1899, at September Term 1900, and this judgment was affirmed on appeal by the Court of Appeals of Maryland, in January 1901. (For Record of this case, see pp. 97-110; prayers of the Court on p. 110. For report of case see 93. Md. 113 et seq.)

It is contended by the complainant below, and so ruled by the Court, that he is not estopped by these decisions, because he was not an actual party to the suits.

The doctrine of *stare dcisis* and *res adjudicata* rests on a broader ground than technical estoppel. It has been called "a rule of rest," and is founded on public policy.

The above decisions certainly make the "law of the case," and settle the *rights* of the County Commissioners and the *duty* of the Railroad Company, which became "the thing adjudged." New Orleans vs Citizens Bank 167 U. S. 398 Covington vs First National Bank 198 U. S. 100. This is a clear attempt by a collateral proceeding to bring the Federal Court into direct conflict with the State Court, and presents the example of one Court indirectly interfering with the decision of a Court of concurrent jurisdiction and annulling its effect as between the parties. "The fact that the parties to the injunction proceedings are not the same as the parties to the judgment, or decree which it is sought to enjoin, does not relieve the case from the operation of the rule—it is to protect Courts of co-ordinate jurisdiction and avoid conflict of jurisdiction, confusion and delay in the administration of justice." 11 A. &. E. Enc. Law (2 Ed) p. 398, citing Crowley vs. Davis, 37 Cal. 269, and other cases.

The distinction between *res adjudicata* and *stare decisis*, is the difference "between a decree and the law declared by the Court which produces the decree; and though a person may not be bound by a decree as a party or privy, he may be bound so to speak by the law which produces the decree. That is to say, his rights are affected, as all other citizens rights are effected by the declaration of the law made by the Courts in the due administration of justice." 24 A. & E. Enc. Law (2 Ed.) 715 note 3, citing 60 N. J. Eq. 121, Newark City Bank vs. Crane.

The evils of such a conflict is forceably shown in the opinion of the Court, in Phelps vs. Mutual Reserve Fund L. Assn., 61 L. R. A. 717 (50 C. C. A. 339) and affirmed in 190 U. S. 147. But the complainant says his rights accrued before these decisions of the Maryland Court. The answer to that is, "the law of the case" had been settled and the thing adjudged, before he instituted his suit; and he fails to assign any reason in his bill for his delay, or for renewing the combat.

The language of this Court, in the case of the City of Dawson vs. Columbia Ave. Trust Co., 197 U. S. supra, is especially applicable just here: "The Court will look beyond the pleadings and arrange the parties according to their sides in the dispute. When that is done, it is obvious that the company is on the plantiff's side, and was made defendant solely for the purpose of re-opening, in the U. S. Court, a dispute which had been decided against it in the Courts of the state."

It was there characterized as a "contrivance between friends to found a jurisdiction." The plaintiff claims to be in privity with the Railroad Company as to the benefits of its alleged "contract" with the State, yet not bound by a decision which binds the Company. While the Federal Courts are not controlled by the decisions of the State Courts in matters of general principles of the law, they deem themselves uniformly bound to follow them when *construing their own statutes;* and the jurisdiction of the Federal Court must rest on other grounds than the mere unconstitutionality of the taxes involved, Sheldon vs. Platt, 139 U. S. 591-599, reviewing the cases where injunctions were granted, and affirming Dows vs. Chicago, 11 Wall. 108.

THIRD. *Is not the bill defective in not complying with the 94th. Equity Rule; or does it allege sufficient grounds for equitable interference?*

It fails to set forth that the suit is not collusive to confer jurisdiction or to state "with particularity the efforts to secure action on the part of the managing directors, and the causes of failure." This rule, it seems was adopted immediately after the case of Haws vs. Oakland, ~~140~~ 127 U. S. 450, and referred to in Corbus vs. Alaska Treadwell G. M. Co., 187 U. S. 462, and is stated as follows: at p. 464

"If the party primarily and directly charged with a tax is unable to make a case for the interference of a Court of Equity, no one subordinately or indirectly affected by the tax should be given relief, unless he shows, not merely irreparable injury to the tax debtor as well as himself, but also that he has taken every essential preliminary step to justify his claim of a right to act in behalf of such debtor."

The Complainant alleges no damage as a fact, but says that he is *apprehensive of loss.* See (Paragraph XVIII Bill of Complaint, page 11 of Record.)

FOURTH. *Is this not in effect a suit against the State of Maryland?* The allegations in this bill (like those in the case of Davis & F. Mfg. Co. vs. Los Angeles, 189 U. S. 221,) upon which the Complainant depends for jurisdiction, are diversity of citizenship and the unconstitutionality of "the ordinance or resolution passed by the defendants, under which said taxes are attempted to be enforced—which will impair the obligation of the contract made by Chapter 133, of the Acts of Maryland of 1886." Record p. 11, paragraph XVII.

It is contended by the Complainant, and so ruled by his Honor Judge Morris, that "the imposing of a tax on this property is a legislative act, impairing the obligation of the contract of exemption, and within the inhibition of the Federal Constition." (Record page 122.)

The Circuit Court of Appeals says, "the demand on the part of the County Commissioners is in the nature of a legislative act, and therefore is in violation of Art. 1, Sec. 10 of the Constitution of the United States." We respectfully submit, the conclusion that the ordinance, or the demand, impairs the obligation of a contract, is predicated upon insufficient foundation, even though it be a "legislative act," in which event it would be the act of the State of Maryland through one of its properly constituted authorities and its unconstitutionality, the unconstitutionality of a state law, Davis & F. Mfg. Co. vs. Los Angeles, supra; this being so, the effect of this injunction is to restrain one of the "properly constitued authorities of the state" *from performing a legislative act.*

What difference is there between enjoining the Legislature itself, as a State Agency of government, and enjoining the Petitioner as a subordinate agency; both are provided for and limited by the Constitution, which says of the County Commissioners, "their powers and duties shall be such as are now, or shall hereafter be conferred by law". (Constitution of Maryland, Art. 7, Sec. 1.).

Since much of the state government is committed by the Legislature, under the Constitution of the state, to these political divisions, the effect of this decision will apply to each county and to Baltimore City, and the practical effect is to subordinate to the Federal Courts, by injunction, these governmental agencies.

It has been held that an injunction will lie against a state officer, acting merely *colori officii*, who commits a trespass; or as said in *ex parte* Ayers 123 U.S. 500, an "injunction will lie to restrain the collection of taxes sought to be collected by *seizure of property*, imposed in the name of the state, but contrary to the Constitution of the U. S., defendants being officers threatening *the distrain complained of*——are threatening a violation of the personal or property rights of the complainants, for which they are personally, or individually liable". This is called "the vital principle in all such cases." The 11 Amendment "must be held to cover, *not only suits brought against the state, by name,* but also those against its officers, agents, and representatives, where the state though not named as such, is nevertheless the only real party against which relief is asked".

When the question arises, whether a contract is impaired or not, it must be; has the State impaired it, and not whether there is a breach of it. And when the question arises in regard to a Charter Contract between the state and one of its creatures, no one but the state can *impair* it, therefore to restrain its impairment when the state is effected by suit, must be *to restrain the state*, and it does not matter whether it be the state in its whole sovereign capacity, or one of its corporate state agencies, or departments, or divisions. The distinctive words that permit an injunction against the state officers, who are assuming to act *virtute officii*, but who are in fact acting only *colore officii*, are such words as "actual invasion", "distress", "trespass", "personal liability" as trespassers, &c. No such condition is shown in this case.

The distinction is again made clear in Fitz v. McGhee 172 U. S. 53 "between some act of wrong or trespass, and a suit against officers of the state merely to test the constiutionally of a statute, in the enforcement of which those officers will act only by formal proceedings in the Courts of the state."

The case of Shelton v. Platt, 139 U. S. 591, was a bill for an injunction by Thos. A. Platt, as President of U. S. Express Co. for himself and others, against the Comptroller of the state and the Sheriff, averring that the Comptroller had issued a *distress warrant to the Sheriff and had levied* on, or was about to levy on the property of the Express Co. Mr. Chief Justice Fuller said, touching the jurisdiction: "It is asserted by counsel that a Court of Equity has jurisdiction to restrain the collection of a tax, when the tax is wholly illegal and void, and that such jurisdiction has been uniformly exercised in Federal Courts" (cases cited); "but the jurisdiction will be found to have rested on other grounds than merely the unconstitutionality of the tax involved";

FIFTH. *Is not the Rule of Construction adopted by the Court of Appeals of Maryland, the Rule of Construction for this Court?*

Whatever may be the opinion of the correctness of the decisions of the Maryland Court of Appeals, we respectfully contend that those decisions, being the *construction of the statutes* on which the complainant rests his claim, settle "the law of the case". The complainant alleges, and the U. S. Circuit Court finds that the contract is in the construction of the statute Art. 23, Sec. 188 of the code Maryland, and makes it depend

on the meaning of the word "immunities" and undertakes to discover the legislative intent from this word, because it is an apt word to include exemption from taxation. After an able review of the authorities, which sustain the doctrine that this exemption is "a personal privilege", and to be given only by "direct legislation" and not "assignable", the learned Judge says on page 121 of the Record, "it is difficult to concive what immunity in respect to this property could be meant, if not the immunity from taxation, which the original company had". With great respect, we submit that this is not the necessary inference; and it presents this dilemma; if the Court meant to *refer*, and *confine* the word immunity "to this property" and *its* exemption from taxation, then it is exclusive of other immunities. But neither this property nor this corporation was in the mind of the Legislature, and if it is used with reference to *the right* of this company, or any corporation so organized then it is made too comprehensive in order to include by implication, an immunity which is never given by implication, and which is not a positive right, nor is it necessary to gratify every positive right under the statue, or Secs. 187 et seq. of Art. 23, which constitutes a part of a general statute relating to the sale of mortgaged *railroads only*. The exemption from taxation "does not become impressed on the property itself into whosesoever hands it should afterwards come". L. & N. R. R. Co. v. Palmes, 109 U. S. 250. In this case, the officers of the corporation had exemption from militia duty. In Covington vs. Sanford. 164 U. S. 578, there was emeption from legislation regulating rates, and it was said, "the grant should be construed *strictissimi juris* when applied to the exemption from legislative control of toll", affirming Morgan vs. Louisiana, 93 U. S. 217.

The plural form of the word implies more than one immunity; therefore, in the light of the authorities, the most liberal construction can only include such "immunities" as are transferable and essential to the operation of a corporation.

In construing this statute, the Court of Appeals of Maryland, in Mayor &c. of Ocean City, vs. Baltimore, Chesapeake and Atlantic Ry. Co., 89 Md., adopted this rule of strict construction, and at page 98 says: "There is no such express statutory authority in this case. The 187 and 188 Secs. of Article 23 of the Code, relied upon by the appellant, refer to such rights and property, as would pass under the sale of a railroad mentioned in those Sections, and not to an exemption from taxation such as is presented here." This is quoted and affirmed in 93 Md. 122, B., C. & A. Railway Company vs. Wicomico Co.

. But if the rights of the plaintiff had been invaded, it was not y the Petitioners, who acted only in conformity with the decisions Court of Appeals of Maryland, which had given a construction of tute in connection with the facts; and it is the rule of this Court ow such construction, 5 How. 342, Bank vs. Buckingham, holding he application of an earlier banking law to a bank subsequently ed, is one of construction and not of validity. The same principle l in Baltimore vs. Hopkins, 130 U. S., 223; Central Land Co. vs. y, 159 U. S. 110, *where it was one of construction and not of validity.* construction of State statutes the case of the State Railroad Tax 92 U. S. 575-617 declares the decision of a State Court to be "the f Decision" of the Federal Court; Fairfield vs. Galatin Co., 100 U. Wilson vs. Standefer, 184 U. S. 412.

the case of Gulf & S. Island Co. vs. Hewes, 183 U. S. 68, this was asked to correct the decision of the Supreme Court of Miss. but e 75 it is said: "The whole foundation of our jurisdiction in this class s must rest upon a contract which can not be legally impaired". ll the Court's attention to Sec. 2, Acts of 1886, Ch. 133, which ex- not only the property of the Baltimore & Eastern Shore R. R. Co., so "the shares of capital stock and bonds" of the Company. By Sec. stock is *limited* to $500,000.00, while by the Charter of the Balti- Chesapeake and Atlantic Ry. Co. (Record page 71) the capital stock "this corporation shall be $1,000,000.00". Now if the exemption 6 is not lost, it follows by the creation of this new corporation, that l of $500,000.00 of shares there are $1,000,000.00 of shares exempt, nds in proportion, without the authority or knowledge of the Leg- re.

3. We here submit that the Act of 1876, Chapter 322, Codified in 3, Sec. 302, Code of 1888, being Sec. 417 of Art. 23, of late Code *sets at rest the proper construction* of this Article, as to exemption taxation, whatever other meaning may be given to the word "immu- ".

Nothing in this Article contained shall be construed as to bring any supposed exemption from taxation, State, County or Municipal, Charter of any Company desiring to take advantage of any of the ions in this Article contained, any property, real, personal or mixed, l under or by virtue of any of the provisions of this Article, or any preferred or otherwise, or any bonds or other evidence of debt issued or by virtue of any of the provisions of this Article".

SIXTH. But independent of the decisions of the Court of Appeals of Maryland, the larger questions are:

1. *Is there a contract of Exemption* between the State of Maryland and the Baltimore, Chesapeake & Atlantic Ry. Co.?

2. What has the State done that it did not have the power to do in regard to this exemption?

To raise a contract, the Complainant relies on several constituent facts:

A. The Act of 1886, Ch. 133, enlarging the original charter powers of the Baltimore & Eastern Shore R. R. Co., in which the exemption was granted it for thirty years. Bill of complaint, paragraph III, page 253 of Record.

B. The Mortgage from this corporation to the Atlantic Trust Co., pages 47 and 68, and paragraph VI, page 5 of Record.

C. The decree of foreclosure by the U. S. Circuit Court for the District of Maryland. Record, page 35.

D. The sale to Mr. Nicholas P. Bond, and its ratification. Record, Page 45, and paragraphs VII, VIII, IX, Page 6.

E. The forming of the Baltimore, Chesapeake & Atlantic Ry. Co. by him and his associates. Record, Page 71 for Charter.

F. The construction and application of Sec. 187 and 188 et seq., Art. 23 of the Code of Public General Laws of Maryland to the above state of facts. Record, Page 7, paragraphs X, XI, XII.

1. There ought to be no doubt about the rights and powers in two stages of this evolution of rights and powers.

a. That the Baltimore & Eastern Shore R. R. Co. did have *a gift, but not a contract* of exemption.

b. And that it could not assign or mortgage this exemption to the Atlantic Trust Company.

An exemption from taxation is not a vested right, a property right, or a positive right, 67 N. Y., 116, People vs. Supervisors; 161 U. S. 662, Pearsol vs. Great Northern R. R. Co., holding that it is only such rights as are necessary to the full enjoyment that are contracts.

The root of the alleged contract is in Sec. 2, Ch. 133, Acts of 1886, giving the exemption to the Baltimore & Eastern Shore R. R. Co., but this

exemption was not a part of the original Charter of this corporation, and the grant is a mere gratuity.

Appeal Tax Court vs. Grand Lodge, 50 Md., 428.

Rector vs. Philadelphia, 24 How. 300

Grand Lodge vs. New Orleans, 166 U. S. 148.

People vs. Commissioners, 47 N. Y. 504.

2. The U. S. Circuit Court of Appeals argues "that there is a general inclination on the part of Legislatures to grant immunities to railroads and other corporations with a view to encouraging the development of particular sections" etc. This argument as the reason or ground for the contract, is fully answered in the case of Wis. & M. R. R. Co. vs. Powers, 191 U. S. 386. The first question was whether the general statute of 1897 repealed the law of 1893, giving a qualified immunity from taxation to any railway company hereafter building and operating a line of railway within the State north of parallel 44, of latitude until, &c.

The Court held that the Act of 1897 did repeal that of 1893, else "the plaintiff would have no standing in Court", and then proceeded with "the first and main question, whether the Act of 1893 purported to make an irrevocable contract with such railroads as might thereafter comply with its terms. The question is pretty well answered by a series of decisions of this Court, A distinction between an exemption from taxation in a special charter and a general encouragement to all persons to engage in a certain class of enterprise is pointed out in East Saginaw Mfg. Co. vs. East Saginaw, 13 Wall. 373".

The differentiation between a *contract* in terms of a bargain by the state with one of its corporations, and a *gift* from the state is so clearly set forth in the case of Wis. & M. R. R. Co. vs. Powers (supra) and is so appropriate in several respects as to seem decisive of this case. *The complainent does not rely upon a special charter, or exemption given to it, but to a special exemption given to another corporation and upon "the general encouragement"* (not to build a railroad), *but to take over, under a general law (Art. 27, Sec. 187 &c.) any mortgaged railroad corporation,* that has been sold. The decision proceeds: "the broad ground in a case like this is that in view of the subject matter, the Legislature is not making promises, but framing a scheme of public revenue and public improvement".

The scheme of Art. 23, Sec. 187 et seq., applying only to the sale of rail roads, was to provide an easy, expenditious and cheap method for the purchaser and his associates to form a new corporation, and to transfer to it all that he bought under the mortgage. "In announcing this policy and providing for carrying it out, it may open a chance for benefits to those who comply with its conditions, but it does not address them, and, therefore, it makes no promises to them". The purchaser under the Act and Secs. named is not "addressed." He is only empowered to do something if he wishes; and it is impossible to address a corporation not *in esse*, and that may or may or not be formed *in furturo.*

The vice and danger of the claim made is most forcibly stated. "It would be quite intolerable, if parties not expressly addressed, were allowed to set up a contract on the strength of their interest in, and action on the faith of a statute, merely because their interest was obvious and their action likely on the face of the law. What we have said is enough to show, that in our opinion, the plaintiff never had a contract, and, therefore, makes it unnecessary to consider the usual power to alter, amend, or repeal charters, contained in the Constitution of Michigan". W. & M. R. R. Co. vs. Powers.

But *what promise* has the Balto., Ches. and Atl. Ry. Co. made to the state? And what has it done to its own detriment to bind the state? It found a magnificent charter and a railroad already built, and entered into possession thereof.

According to the theory of the Complainant, *the state gives all and takes nothing—and conversely, the railroad corporation has a right to demand all and give nothing.* The analogy, both in fact and reason, in the case of the Ches. & Ohio R. R. Co. vs. Miller, 114 U. S. 177, to this is striking. There the railroad company was incorporated under a statute providing for the purchase of an insolvent corporation, and claimed the exemption of the former. In speaking of the later statute, the Court said: "*The subject matter of this legislation was not the original construction of the railroad, but the operation of a railroad, already constructed.* The state was not in the attitude of a contractor soliciting subscriptions of captial stock, &c. It was legislating in reference to enterprises already undertaken, prosecuted, and completed by companies originally thus incorporated," and is the exact condition of this case.

Referring to the statute as creating a contract and stating their conclusions, as above, the Court also said: "Were it otherwise,—we should nevertheless be compelled also to hold on distinct grounds, that the exemption thus conferred did not constitute a contract prohibited from repeal". In the case of the Phoenix In. Co. vs. State of Tennessee, 161 U. S. 175, this Court held that there was *no contract, and no Federal question* involved in the case.

That the grant of exemption is a gratuity and not a contract, see Tucker vs. Ferguson, 22. Wall. 527-576, which is a leading case.

SEVENTH. These corporations carry two distinct legal ideas or rights:

1. The right or franchise to be a corporation—its corporate existence.

2. The franchise of maintaining, operating and owning it, and such substantial rights as are essential to these ends.

Now what did the *Baltimore & Eastern Shore Railroad Co. mortgage to the Atlantic Trust Co.*, and what *did Mr. Bond buy at the foreclosure sale?*

This is best answered by reference to the cases of Memphis & Little Rock Railroad Co. vs. Berry, 112 U. S., page 609; and People ex rel Schurtz vs. Cook, 148 U. S., page 397 (S. C. 110 N. Y. 443) since these cases are so analogous in principle, and the cases of Memphis & Little Rock Railroad Co., goes so on all fours with this, as to be conclusive. In the original charters in both of these cases there were exemptions from taxation granted by the Legislature; mortgages by the Railroad to secure bonds; sales under the mortgages; the right of purchasers to reorganize under statutes like the Maryland statute; and giving to the reorganized corporations "all the corporate rights, liberties, privileges, *immunities*, powers and franchises of and concerning the railroad so sold, etc.", Memphis Railroad Co., 112 U. S. page 614.

The same powers, with the same word "immunities" were in the New York Statute of Reorganization. In the Arkansas case, supra, there was a "bill to enjoin the Railroad Commissioners from appraising for the purposes of taxation any property of the plaintiff in error, on the ground that it is exempted from taxation by a contract with the State contained in its charter of incorporation". After holding that "the franchise of being a corporation belongs to the corporators" and that the "corporation has no

power to dispose of this franchise", (page 619) and after holding that the Reorganization Statute was "a *matter of law and not of contract*, and conferred only the *right* to organize as a corporation", upon the purchaser or bondholders, even "if in the charter under consideration, it had been conferred in express terms", (page 621), the Court says: "Our conclusions then are, that exemption from taxation contained in 2d Sec. Act of Jan 11th, 1853 was intended to apply only to the Memphis & Little Rock Railroad Co., as the original corporation organized it; that it did not pass by the mortgage of its charter and works" et seq.

In the case of the People vs. Cook, supra, the contention was that the reorganized corporation was not liable under the Act of 1886 for the franchise tax of ½ of one per cent. on its capital stock. Mr. Peckam, J, in 110 N. Y. page 448, says, "the counsel for the appellants claim that the Act of 1886 applies to cases where the State grants franchises to a corporation, and it was stated that none was granted in such a case as this. They also argued that the reorganization Act of 1874, amended in 1876, in such a case as this simply continued or revived the franchises of the old corporation under the same charter and with the same immunities and rights held by the former company. Lastly, they claimed that the Act of 1886 was unconstitutional in violation of the provisions of the Federal Constitution. We think none of these claims is well founded", and the Court also holds that the reorganization acts "were in no sense contracts on the part of the State"; relying on Memphis & L. R. R. Co., supra. On writ of error, this conclusion was sustained by this Court. Same case in in 148 U. S. 397. At page 404, after quoting with approval Judge Peckam's opinion and answering the argument of counsel made against it, this Court affirms the decision. We submit that the exemption, being a personal privilege of the Baltimore & Eastern Shore Railroad Co., and not assignable, and the corporate existence of that Company being the franchise of the corporators and not transferable, it follows that if its corporate existence is still extant then this exemption belongs to or inheres in its being; or if it is dissolved then the exemption passed away with its dissolution as in the case of a natural person.

Suppose Mr. Bond had operated this railroad, as he had a right to under the cases just cited; or suppose that he had sold it to some corporation already existing, authorized to buy and operate it, could it be successfully contended that either he, or this corporation, would have the exemption granted the Baltimore and Eastern Shore Railroad Company?

EIGHTH. *What has the State done in violation of Art. 1, Sec. 10 of the Constitution of the United States?*

1. The power of the Legislature, under *Art. 3, Sec. 48* of the *State Constitution*, to alter or amend the charter is conceded by the plaintiff and by the Court. As a matter of law and fact, has not the State, by the General Assessment Law of 1896, Chapter 120, repealed the exemption? Sec. declares, "All state and county taxes shall be levied upon assessments made in conformity to the provisions of this Article, and in conformity with all laws relating to revenues and taxes not embraced in this Article." In the following Section, specifying what property shall be taxed, is the following: "*The property, real and personal, of each and every railroad company in this State, working its road by steam power, shall be valued and assessed for county and municipal purposes, in the same manner as the property of individuals may be valued and assessed under this Act.*" Then follows a section giving exemptions. This repeals the exemption because of the repugnancy between the exemption in the statute, and "the statute which was intended as a revision of the laws upon the subject of taxation."

Columbia Mfg. Co. vs. Vanderpool, 4 Cowen 556.

The Act of 1896, Sec. 2, page 188, "exceptions and provisos," reserves from its operations any "irrepealable contract or obligation", but reserves no special exemptions. State vs. N. C. R. R., 90 Md. 472, for repeal by implication. To tax "each and every railroad company in this State in the same manner as individuals" must take in this company.

In N. C. R. R. Co. vs. State of Md., 187 U. S., 266, it was contended by the corporation that the assessment law of 1890 did not repeal the Compromise Act of 1880, and if so, then it was a void Act; but the Court of Appeals of Maryland held otherwise, and was affirmed in this Court.

2. What constitutes the "Legislative act"?

The Circuit Court says, "That the exercising of the taxing power is a legislative act", and violates the Constitution, and the Circuit Court of Appeals says the "demand", etc.

The "taxing power" of assessing was completed in Nov. 1899, and the power involved in the annual levies of 1900 and 1901 were exercised in June of each year. These powers became executed before the filing of the bill of complaint and can not now be restrained; while the levies of the future year were yet to be declared. The prevailing rule in states

which have allowed injunctions to restrain municipalities have only permitted restriction of the enforcement, but not of the passage of even "unauthorized orders and resolutions, or ordinances of municipal corporations". 18 L. R. A. 835 (144 Ill.) Stevens vs. St. Mary's Training School; and refuse to restrain their enforcement, where they are within the jurisdiction, or the exercise of the legal powers of the municipalities. 4 L. R. A. 617 (Ala.) Montgomery Gas Light Co. vs. Montgomery; Des Moines Gas Co. vs. Des Moines, 44 Iowa 55, sustained the doctrine that legislative action of these corporations can not be enjoined. New Orleans Water Co. vs. New Orleans, 164 U. S. 481, holding that "a court of equity can not properly interfere with, or in advance restrain the discretion of a municipal body while it is in the exercise of powers that are legislative in their character—ordinances, if legally enacted, have the force of laws passed by the Legislature of the state, and are to be respected by all."

The relief prayed for in that case was to compel the city to cancel ordinances and grants, and if the city refused, then for the Court to declare them null and void, and to restrain future grants. All of which was refused, even to prevent "multiplicity of actions".

It is conceded in paragraph "Tenth", "Agreed Statement of Facts" page 30 of Record, "That the said Board had the power to assess such property as was liable to taxation, and that it had been omitted from assessment by the general assessors of the said county". This power is vested in the Board by the General Assessment Law of 1896, Chap. 120, Sec. 182, and in Art. 81, Sec. 10 of the Code. And by Art. 7, Sec. 1 of the State Constitution "their powers and duties shall be such as are now, or may hereafter be prescribed by law". There being no doubt about the "power and duty" of the Petitioners, the Court is asked to restrain the exercise thereof.

In 16 A. & E. Enc. of Law, (2 Ed) 423, under the headlines "Enjoining Legislative or Executive Action", it is thus laid down: "Legislative enactments of a state, or of a municipal corporation within the scope of its powers, can not be restrained by injunction, even if the threatened act, if passed, will be unconstitutional and void". *Legislation is the exercise of a political power, and taxation is one of the most important powers of the State. What does it matter whether the State, in the General Assembly exercises it, or whether for convenience, it delegates the power to some subordinate division of the State? The principle is the same.*

NINTH. *Is there any doubt about the right of this railroad company to this exemption?* If so, that must be resolved in favor of the State. Phoenix Co. vs. Townsend, 161 U. S. 177, holding that the "exemption must be made out wholly beyond doubt"; and "must be granted in terms too plain to be mistaken".

Chicago B. & K. Co. vs. Guffey, 120 U. S. 569 575, says: "It can not exist by implication; a doubt is fatal to the claim". Chicago Theological Seminary vs. Illinois, 188 U. S. 672, and many other cases using like strong language.

This statute, to support the complainant's contention, must be thoroughly reconciled with the presumption against exemption, with that exactness and directness demanded by all the authorities relating to these exemptions; it must be reconciled with the revenue laws of the state and with the general policy and sovereign power of the state, in regard to taxation, expressed in Art. 15 of the Bill of Rights, that "Every person in the state, or person holding property therein, ought to contribute his proportion of public taxes for the support of the Government, according to his actual worth in real or personal property".

But whatever doubt, if any, may have existed as to the proper construction of Sec. 177-188 et seq. Art. 23, it has been removed by the decision of so able a tribunal as the Court of Appeals of Maryland, which has established the law in Maryland, and for the citizens thereof.

But if this question were *res intregra* in a Court of competent jurisdiction for decision, the sole questions would be, not the impairment of a contract, but did the exemption revive upon the formation of a new corporation, *ipso facto*, under Sec. 187, etc., Art. 23; and if so, has the Legislature repealed the exemption by the General Assessment Law of 1896. It seems to the petitioners that this is a local or state matter, in any phase of it.

But whether the contention of the Petitioners be correct or not, it is most respectfully submitted, that the importance of the question and the conflicting decisions, require the consideration and decision of this Honorable Court, to the end that uniformity and harmony may be established.

Respectfully Submitted,

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